IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

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| PENNSYLVANIA EMPLOYEE BENEFIT TRUST FUND, on behalf of itself and all others similarly situated, JOSEPH MACKEN, and COMMISSIONER LINDA A. WATTERS | ) | |
| Plaintiffs, | ) | Civ. No. 05-075-SLR (Lead Case) |
| v. | ) | |
| ZENECA, INC. and ASTRAZENECA PHARMACEUTICALS, LP, | ) | |
| Defendants. | ) | |

**DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

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October 5, 2005

Defendants AstraZeneca Pharmaceuticals LP and Zeneca Inc. (collectively "AstraZeneca") respectfully submit this Response to Plaintiffs' Notice of Supplemental Authority concerning the California Superior Court's decision in *AFL-CIO, et al. v. AstraZeneca Pharmaceuticals, LP, et al.*, No. BC 323107, a pending case comparable to this case that Plaintiffs' counsel have brought in California state court. AstraZeneca would ask the Court to note three aspects of the decision not identified in Plaintiffs' summary.

First, the California Court acknowledged that the advertising Plaintiffs have used to illustrate their attack does not support their claims, but is "neutral." Specifically, the Court stated that: "The advertising, however, does not appear to support plaintiffs' claims. Most of it does not mention Prilosec, and that which does, does so neutrally." *See* slip op. at p. 8. The Court then reiterated this important point: "It may be that this allegation of explicit representation of superiority is groundless -- plaintiffs give no citation of text . . . or exemplar advertising to support it." *Id.* at pp. 9-10. Were this Court also to find that none of the advertising attached to Plaintiffs' complaint supports Plaintiffs' claims, then AstraZeneca submits that this Court should grant the motion to dismiss. *See generally* AstraZeneca's Opening Brief ("AOB") at 17-18, 32-35; AstraZeneca's Reply Brief ("ARB") at 4-9, 12-13; *citing, inter alia, New Jersey Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. 2003) ("*NJCA*"); *Cytyc Corp. v. Neuromedical Sys., Inc.*, 12 F. Supp. 2d 296, 301 (S.D.N.Y. 1998). Notably, the California decision does not cite any authority for the proposition that if every exemplar offered to illustrate a complaint of false advertising fails to support the claim, a Court should nevertheless allow the case to proceed on the assumption that there may be advertising of which plaintiffs are unaware that supports their case.

Second, unlike Section 2513(b)(2) of the Delaware Consumer Fraud Act, the safe harbor to California's Unfair Competition Law has developed solely through caselaw, because the Unfair Competition Law itself does not contain any express statutory safe harbor provision. Thus, the California Court had no occasion to address the application of such an express statutory provision to the viability of Plaintiffs' claims. *See* AOB at 16; ARB at 4, 7, 11; *compare Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 941-43 (7th Cir. 2001) (construing safe harbor in Illinois Consumer Fraud Act); *cf. NJCA*, 842 A.2d at 177.

Third, AstraZeneca respectfully disagrees with the California Court's decision on preemption, and believes that a review of its Opening and Reply Briefs will show that the Court misapprehended or overlooked AstraZeneca's arguments and authority. *See* AOB at 11-26; ARB at 1-10.

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## CERTIFICATE OF SERVICE

The undersigned certifies that on October 5, 2005, a copy of the foregoing was served upon the following counsel of record:

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